

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ASARO,

Defendant-Appellant.

UNPUBLISHED

March 15, 2005

No. 254765

Wayne Circuit Court

LC No. 03-012765-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MICHAEL ASARO,

Defendant-Appellee.

No. 254837

Wayne Circuit Court

LC No. 03-012765

Before: Zahra, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted on an aiding and abetting theory of second-degree murder, MCL 750.317, for driving the vehicle involved in the drive-by shooting death of David Alonzo. He appeals as of right. We affirm. The prosecutor appeals the downward departure sentence imposed of seven to fifteen years in prison. We reverse and remand for resentencing or rearticulation of a substantial and compelling reason justifying departure.

On appeal, defendant first argues that the trial court abused its discretion when it denied his motion for a new trial because the verdict was against the great weight of the evidence since defendant did not have notice of David Castaneda's intent to shoot out of the rear window and he did not drive in such a way as to facilitate the shooting. He was merely present during this tragic incident. The prosecutor disagrees, arguing that the evidence submitted to the jury clearly demonstrated defendant's facilitation of the fatal shooting by the way in which he operated the car so that the shooter could accurately aim and fire his gun. This Court reviews a trial court's

decision on a motion for a new trial based on the great weight of the evidence for an abuse of discretion. *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003). Such a motion should be granted only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998).

The trial court did not abuse its discretion in denying defendant's motion for a new trial. Second-degree murder is proved if the evidence establishes that the defendant caused a death with malice and without provocation. *People v Harris*, 190 Mich App 652, 659; 476 NW2d 767 (1991). Malice is defined as the intent to kill or to do great bodily harm, or the wilful and wanton disregard of the likelihood that the natural tendency of the defendant's actions will be to cause death or great bodily harm. *People v Kelly*, 423 Mich 261, 273; 378 NW2d 365 (1985). To be convicted of second-degree murder as an aider and abettor, it must be proved that the defendant gave assistance to the perpetrator of the murder in the form of words or deeds that were intended to encourage, support, or incite the commission of that crime. See MCL 767.39; *People v Moore*, 470 Mich 56, 63; 679 NW2d 41 (2004). The aider and abettor must have the same intent as that required of a principal; here, the malice defined above. See *People v Barrera*, 451 Mich 261, 294; 547 NW2d 280 (1996).

In this case, the evidence established that defendant was driving the car during this drive-by shooting. The evidence included that while driving on Cahalan, defendant stopped the car, the rear passenger door opened and then closed, after which defendant drove off very slowly. Then, the rear passenger window was rolled down and three shots were fired out the window at the victim, but he was not hit. Defendant then drove the car around the corner at Central and stopped the car, allowing the shooter in the backseat to hang outside the car window, steadily aim the gun, and shoot five or more shots, one of which fatally struck the victim in the chest. Defendant then sped off down Central. Witnesses driving another vehicle gave chase, but lost defendant when he drove the car at speeds reaching fifty to sixty miles an hour through a residential area, eventually running a red light.

It is clear from the evidence that defendant was not "merely present during this tragic incident;" rather, he played a critical role in its commission. As the driver of the vehicle, he controlled the shooter's location. His actions of stopping the car, then driving off slowly while shots were being fired out the rear window, and then stopping again after the intended target was not shot by these initial shots to allow the shooter a more accurate aim demonstrate both that he aided and abetted the shooter in this murder, and that he possessed the requisite intent—wilful and wanton disregard of the likelihood that the natural tendency of his actions would cause death or great bodily harm. Accordingly, the trial court did not abuse its discretion in denying this motion for a new trial.

Next, defendant argues that there was insufficient evidence as a matter of law to support his conviction because it failed to show that he possessed the requisite intent or aided and abetted his principal. For the reasons discussed above, we disagree and affirm defendant's conviction.

The prosecutor appeals the trial court's downward departure from the sentencing guidelines arguing that it was unsupported by a substantial and compelling reason. We agree. Whether a factor relevant to the imposition of a departure sentence exists is reviewed for clear

error. *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995). The determination that the factor is objective and verifiable is reviewed as a matter of law and whether these objective and verifiable factors constitute substantial and compelling reasons to depart from the statutory minimum sentence is reviewed for an abuse of discretion. *Id.*

Here, the statutory sentencing guidelines provided for a sentence range of 144 months to 240 months. However, the trial court imposed a minimum sentence of eighty-four months. The trial court opined that the facts of the case did not fit the typical aiding and abetting scenario in that “there was nothing to indicate that the Defendant drove the car to this area for the specific purpose of he and his friends to kill or shoot, you know, the victim here.” The court further opined that the guidelines did not “fit the circumstances of this case” because the guidelines are “almost scored as if the person is in fact the shooter here.” The court concluded, “I just don’t think that this, the Defendant here had control of or knew of the circumstances of this person pulling a gun and shooting [the victim] and killing him.”

It appears, then, that the trial court’s articulated “substantial and compelling reason” for the departure sentence was that defendant was not aware that a shooting was to occur until it happened. But this position is directly contrary to the evidence presented. As discussed above, even if defendant was not aware that the rear passenger was armed with a gun, he became aware of that fact when the passenger began shooting out the rear window with the first round of shots. Defendant then drove the vehicle a little further and stopped, allowing the shooter to steadily aim and shoot several more times at his intended victim, until he was struck, and then defendant sped off. Therefore, the trial court’s articulated reason for departure was not verifiable. Further, the articulated reason was not objective; what defendant’s intent was and what he knew prior to the shooting are not objective factors. Accordingly, the trial court’s articulated reason was not objective and verifiable and, thus, cannot constitute a substantial and compelling reason supporting such departure. See *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003). Remand is required for resentencing or rearticulation of a substantial and compelling reason justifying departure. MCL 769.34(11).

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ William B. Murphy
/s/ Mark J. Cavanagh